No. 88-411

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, et. al.,
Petitioners,

-v.-

JOSEPH M. GIARRATANO, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE MARYLAND STATE BAR ASSOCIATION, STATE BAR OF MICHIGAN, NORTH CAROLINA STATE BAR, SOUTH CAROLINA BAR ASSOCIATION, WEST VIRGINIA STATE BAR AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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MOTION BY THE MARYLAND STATE BAR ASSOCIATION, STATE BAR OF MICHIGAN, NORTH CAROLINA STATE BAR, SOUTH CAROLINA BAR ASSOCIATION, WEST VIRGINIA STATE BAR FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 36.3, the South Carolina Bar Association, the Maryland State Bar, the State Bar of Michigan, the North Carolina State Bar and the West Virginina State Bar move for

leave to file the brief submitted herewith as amici curiae. Counsel for the Respondents have consented to the filing of the brief, but counsel for petitioners would not so consent.

The South Carolina Bar is an organization which consists of all persons licensed to practice law in the state of South Carolina. Currently, the South Carolina Bar has approximately six thousand, six hundred and fifty members. Among the South Carolina Bar's (the "Bar") stated objectives is applying the knowledge, experience, and ability of the legal profession to the promotion of the public good. Consequently, the Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in South Carolina, have meaningful access to the court system. It is the experience of the members of the

South Carolina Bar that this access can only be realized if indigent persons are provided with appointed counsel.

The South Carolina Bar does not believe that relying on volunteers and pro bono assistance provides adequate protection for those whose lives hang in the balance. For this reason, the state has taken measures to assist death row inmates in their post-conviction proceedings. South Carolina recently created the South Carolina Death Penalty Resource Center (the "Center"). The purpose of the Resource Center is to assist appointed counsel in the representation of indigent death row inmates. The creation of the Center is a realization that due to the complexity of capital litigation, even attorneys need the assistance of persons experienced in this area of the law.

The North Carolina State Bar is an organization which consists of all persons licensed to practice law in the state of North Carolina. Currently, the North Carolina State Bar has approximately eleven thousand, five hundred and seventy nine members. Among the North Carolina Bar's (the "State Bar") stated objectives is applying the knowledge, experience, and ability of the legal profession to the promotion of the public good.

Consequently, the State Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in North Carolina, have meaningful access to the court system. It is the experience of the members of the North Carolina State Bar that this access can only be realized if indigent persons are provided with appointed counsel. To assist death row inmates in their post-

conviction proceedings, North Carolina has created the North Carolina Death Penalty Resource Center. The purpose of the Resource Center is to assist appointed counsel in the representation of indigent death row inmates.

The Maryland State Bar Association, Inc., is a voluntary professional association which consists of 13,859 member attorneys. Among the purposes of the Maryland State Bar Association, Inc., are to advance the science of jurisprudence, to promote reform in the law, and to facilitate the administration of justice.

The State Bar of Michigan is the association of all licensed lawyers engaged in the practice of law or the administration of justice. It currently has nearly 27,000 active members. Its responsibilities as defined by the

Michigan Supreme Court Rules concerning the State Bar of Michigan include the promotion of improvements of the administration of justice and advancements in jurisprudence. Although this state has never authorized the death penalty in state proceedings, Michigan lawyers as citizens and as members of the legal profession are committed to furthering the fair administration of the death penalty in those states which authorize it in order to prepare themselves for participation in the debate which occurs from time to time as to whether the Michigan death penalty prohibition should be rescinded. Michigan lawyers have also volunteered to represent death row inmates in post-conviction proceedings when it has not been possible to secure the number of counsel needed from among the members of the bar of the particular state.

Recent amendments to federal law pertaining to the sale and distribution of controlled substances authorizing the death penalty have now made that ultimate penalty a reality in our state. Consequently, the bar of Michigan will be directly involved in issues relating to the fair administration of justice in death penalty cases, including the question presented in this case of the right of those who cannot afford to pay for their attorney to have counsel appointed for them.

The West Virginia State Bar is an integrated bar with approximately 4,200 members. According to the Constitution of The West Virginia State Bar, "the objects of the public; to advance the administration of justice and the science of jurisprudence; to improve the relations between the public and the bench and the

bar; to uphold and elevate the standards of honor, integrity, competency and courtesy in the legal profession; and to encourage relations among its members."

The above Bar Associations have a particular interest in the appointment of counsel to represent death sentenced inmates in state and federal post-conviction proceedings due to the compelling interest of all of society in the highest degree of reliability in the imposition of the death sentence. All legal work is complex and difficult, but due to the unique and irrevocable nature of capital punishment, we should be sure that no individual is executed until competent counsel have presented all available grounds for relief to the state and federal courts.

For all these reasons, the South Carolina Bar Association, the Maryland

State Bar, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar believe that the filing of this amici curiae brief is desirable because it presents to the Court significant information about the context in which this case has arisen. The brief is an amici curiae brief in the truest sense. It provides the Court with a unique perspective which differs from those of the parties and will substantially assist this Court by providing it with a different and important perspective from which to evaluate the facts of this case. With that perspective, the Court will be in a better position to evaluate the particular facts about Virginia and the detailed legal arguments which the parties are presenting in their briefs.

Accordingly, the South Carolina Bar,

the Maryland State Bar, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar respectfully request the Court to grant this motion for leave to file an amici curiae brief.

Respectfully submitted,

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January 13, 1989

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The South Carolina Bar is an organization which consists of all persons licensed to practice law in the state of South Carolina. Currently, the South Carolina Bar has approximately six thousand, six hundred and fifty members. Among the South Carolina Bar's (the "Bar") stated objectives is applying the knowledge, experience, and ability of the legal profession to the promotion of the public good. Consequently, the Bar is concerned that all indigent defendants, and especially all indigent inmates on death row in South Carolina, have meaningful access to the court system. It is the experience of the members of the South Carolina Bar that this access can only be realized if indigent persons are provided with appointed counsel.

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to the state and federal courts.

For all these reasons, the South Carolina Bar Association, the Maryland State Bar, the State Bar of Michigan, the North Carolina State Bar, and the West Virginia State Bar are very interested in this case, which will address whether indigent death sentenced prisoners may secure meaningful access to the courts without the assistance of appointed counsel in capital collateral proceedings.

SUMMARY OF ARGUMENT

This case presents the question whether indigent death sentenced inmates are entitled to court-appointed counsel in state post-conviction proceedings. Based upon the experience of the South Carolina Bar, the only way to provide meaningful access to the courts to indigent individuals on death row is through the appointment of counsel. Many of these individuals are illiterate, some are mentally retarded, others are--to one

degree or another--mentally ill, and thus unable to represent themselves. Any lay person, however, especially one confined in a small cell without financial resources, is unable, due both to the complexity of the law involved in capital litigation as well as the need for intensive factual investigation, to achieve meaningful access to the courts without the assistance of counsel. Therefore, based upon the experience of the Bar, as well as this Court's prior decisions guaranteeing an inmate the right of access to the courts, amicus contends that the United States Court of Appeals for the Fourth Circuit correctly decided that there exists a constitutional right to counsel for indigent death sentenced inmates in state post-conviction proceedings.

ARGUMENT

INDIGENT DEATH ROW INMATES CANNOT ACHIEVE MEANINGFUL ACCESS TO THE COURTS WITHOUT THE ASSISTANCE OF COUNSEL

A. This Court held in Bounds v. Smith that prisoners are entitled to meaningful access to the courts.

This Court held in Bounds v. Smith, 430 U.S. 817, 828 (1977), that inmates have a "fundamental constitutional right of access to the courts." Bounds was an action, brought pursuant to 42 U.S.C. §1983, by prison inmates in North Carolina. These prisoners sought legal research facilities to assist them in filing habeas corpus petitions and section 1983 claims, and alleged that North Carolina, by failing to provide such facilities, denied them access to the courts in violation of the fourteenth amendment.

This Court agreed, holding that prison authorities are required "to assist inmates in the preparation and filing of meaningful

legal papers" by providing prisoners with either adequate law libraries or assistance from legally trained personnel. Bounds, supra, 430 U.S. at 828. Rejecting the argument that states could not be obligated to expend funds to effectuate such a right, the Court noted that its previous decisions "have consistently required states to shoulder affirmative obligations to assure all prisoners meaningful access to the courts." Id.

This Court emphasized in Bounds that mere "access to the courts" is not enough. Rather access must be "adequate, effective, and meaningful," and it must extend to "all prisoners." Id. at 822, 824. Indeed, Bounds, specifically distinguished "the access rights of ignorant and illiterate inmates... unable to present their own claims in writing to the courts' from those of "inmates able to present their own cases." Id. at 823-24. As an example,

this Court noted that for illiterate inmates, a law library alone is not enough -- meaningful access "required at least allowing assistance from their literate fellows." Id. (emphasis added).

Subsequent to Bounds, courts have recognized that there are classes of inmates whose special circumstances require that they receive more than the minimum assistance permitted by Bounds--a law library--in order to achieve meaningful access. See, e.g., Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980) (holding that "[l]ibrary books, even if 'adequate' in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate"); Valentine v. Beyer, 850 F.2d 951, 956-5 (3rd Cir. 1988) (recognizing the special needs of closed custody, illiterate, and non-English speaking inmates); Knop v. Johnson, 655 F.Supp. 871, 882 (W.D. Mich. 1987) ("A

court, rather, must measure the adequacy of defendants' system of legal access by the inmates' ability to gain access to the courts through that system. In this case, plaintiffs [illiterate inmates] have established a credible claim that they are not able to gain adequate, effective, and meaningful access to the courts through defendants' system.").[1]

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[1]Petitioners contend that Pennsylvania v. Finley, ____ U.S. ____, 107 S.Ct. 1990 (1987), has resolved the constitutional question presented in this case. In Finley, as the Fourth Circuit recognized, this Court held that the procedural framework of Anders v. California, 386 U.S. 738 (1967), did not apply to attorneys seeking to be relieved in state post-conviction matters. 847 F.2d at 1121. In doing so, this Court determined that, in general, there was no "constitutional right to counsel" for post-conviction proceedings. 107 S.Ct. at 1993.

However, Finley did not address whether requiring the appointment of counsel in post-conviction representation is in every conceivable situation an impermissible remedy for a federal court to order. Merely by characterizing any remedial order providing representation as "creating a new right to counsel," Virginia and other states can similarly oppose--no matter what the facts--every

This Court has never addressed the question whether indigent persons under sentence of death are a class of persons entitled to more than minimum assistance--access to a law library--mandated by Bounds. A majority of the en banc court of appeals in this case determined that they were. Giarratano v. Murray, 847 F.2d 1118,

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potential judicial determination that such relief might be warranted. As an example of such a remedial order, the Fourth Circuit found, in a later proceeding in Bounds itself, that North Carolina had engaged in "a decade-old pattern of neglect and delay" to ignore or circumvent this Court's 1977 Bounds decision. 813 F.2d 1299, 1304-05 (5th Cir. 1987), opinion adopted en banc, 841 F.2d 77 (4th Cir. 1988). Because North Carolina had failed to provide meaningful access through adequate law libraries, the Eastern District of North Carolina ordered the remedy of providing North Carolina's prisoners with a prison legal services program. In affirming the decision of the district court, the Fourth Circuit certainly did not address whether Finley divested federal courts of their powers to fashion such relief. Conversely, this Court did not mention Bounds in its Finley decision. Had this Court intended Finley to have the far-ranging preclusiveness Petitioners now urge, the Court would have had to modify its decision in Bounds.

1122 (4th Cir. 1988). This recognition by the Fourth Circuit was well grounded in the prior decisions of this Court, which have consistently underscored the "significant constitutional difference between the death penalty and lesser punishments." See, e.g., Beck v. Alabama, 447 U.S. 625, 637, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980); see also Booth v. Maryland, ____ U.S. ____, 107 S.Ct. 2529 (1987) ("death is a punishment different from all other sanctions."). This difference, of course, results from the unique and irrevocable nature of capital punishment. Ake v. Oklahoma, 470 U.S. 68, 87 (1985). Because of the finality inherent in sentencing a person to death, this Court has maintained a commitment to the "'need for reliability in the determination that death is the appropriate punishment in a specific case.'" California v. Brown, 479 U.S. 538, 543 (1987) (quoting Woodson v. North

Carolina, 428 U.S. 280, 305 ((1976)). In addition, this Court has recognized that matters affecting an already condemned prisoner call for "no less stringent standards than those demanded in any other aspect of a capital proceeding." Ford v. Wainwright, 477 U.S. 399, 407 (1986).

For reasons that will be set forth in more detail below, indigent death sentenced inmates cannot achieve meaningful access to the courts without the assistance of counsel.

B. Because the majority of death row inmates are either totally or functionally illiterate, mentally retarded or mentally ill, they are unable to achieve meaningful access to the courts without the assistance of counsel.

There are a number of practical reasons why death row inmates are not able to represent themselves in post-conviction proceedings, even if they were provided

unlimited access to adequate law libraries.

1. Illiteracy

Many inmates are totally or functionally illiterate. In the South Carolina prison system, for example, seventy-five per cent of the inmates read below the sixth grade level.[2] The figures for prison systems in other states are similar.[3] There is no reason to believe that death row inmates are any brighter than those in the general prison population. Thus it no exaggeration to say that the majority of death row inmates are totally or functionally illiterate and thus unable to

[2]Statistics provided by Meryl Brigman, Department of Education of the South Carolina Department of Corrections.

[3]In North Carolina, approximately seventy percent of the inmates function below the fifth grade level. In Maryland ninety-two percent of the incoming inmates read below the eighth grade level. (Statistice provided by Maryland and North Carolina Department of Corrections.)

review their transcripts for possible issues, to do legal research, prepare pleadings or take other steps to represent themselves.[4] This Court itself has previously realized that "jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."[5] It should

[4]Intelligence and educational levels among prisoners as a group are very low. A 1968 study of federal and state prisons found that in most states the average prisoner had only eight years of education. In states with large death row populations, the figures were even more troubling: 40% of Florida inmates completed less than nine years of education; Louisiana inmates averaged six years of schooling; and Texas inmates had an average educational level of 5.1 years. In 1982 a federal district court, following extensive evidentiary hearings, found that more than half of Florida's inmates were functionally illiterate. See Mello, Facing Death Alone: The Post Conviction Attorney Crisis on Death Row, 37 Am.U.L.Rev. 513 (1988).

[5]Johnson v. Avery, 393 U.S. 483, 487 (1969).

come as no surprise that death row does as well.

2. Mental Retardation

Additionally, there are a number of mentally retarded inmates on death row in the country. See Blume, Representing the Mentally Retarded Defendant, The Champion 31 (October 1987); see also Penry v. Lynaugh, 832 F.2d 915, cert. granted 5th Cir. 1987 ___U.S.___, 108 S.Ct. 2896 (1988). Obviously, an individual that is mentally retarded is unable to review the record of his trial, identify any available grounds for collateral relief, do even rudimentary legal research or draft basic pleadings for post-conviction proceedings. See Smith v. Kemp, 849 F.2d 481 (11th Cir. 1988) (mentally retarded person sentenced to death in Georgia did not understand Miranda warnings).

The mentally retarded prisoner is

usually not even capable, of assisting his attorney(s) in conducting post-conviction litigation, much less representing himself.[6] In many instances these persons are unable to recall details about the events of the crime, or details about their past and background. their educational events. These inabilities prevent a retarded person from explaining to his attorney his role, if any, in crime or the events surrounding his trial. For example, one retarded person sentenced to death in South Carolina, after a motion to vacate his death sentence was denied by a state trial judge, answered in

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[6]See generally Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 479-84 (1985) (describing difficulties facing mentally retarded defendants at trial); Blume, supra; Mickenberg, Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem, 17 Cal. W. L. Rev. 365, 387-401 (1981) (enumerating essential mental abilities for any defendant to stand trial and noting mentally retarded defendant's inability to reach these capacities).

response to his attorney's question about how he felt, "I ain't too sure ...I feel good anyway ...I got a new trial."[7]

3. Mental Illness

Further, many death row inmates suffer from a variety of mental illnesses.[8] See generally, Ford v. Wainwright, 477 U.S. 399 (1986). While the severity of the mental illness varies among individual inmates, a person that is sick cannot be expected to reliably represent themselves in post-conviction proceedings. While many of these inmates were mentally ill prior to being condemned, others became that way while on death row. Ford v. Wainwright. These mental disorders can directly affect an inmate's ability to proceed pro se. For example, it has been found that death row inmates minimize the gravity of their legal situation as a psychological defense mechanism.[9] Another study has found in condemned prisoners a pattern of shock, denial, and depression, coupled with "a fatalistic belief that the person is a pawn in the process that will coldly and

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[7]Marcus, Retarded Killer's Sentence Fuels Death-Penalty Debate, Wash. Post, June 22, 1987, at A1, col. 1. His lack of understanding of the proceedings was further revealed during an interview. Arthur was asked what it would mean if he were executed. He answered: "What happens? That's a tough one. For one thing, that learning what I just learned, what I learned in [the penitentiary] that would amount to nothing . . . and my GED [high school equivalency degree], I wouldn't see no GED. I wouldn't get my GED."

[8]Lewis, Pincus, Feldman, Jackson & Bard, Psychiatric, Neurological and Psychoeducational Characteristics of 15 Death Row Inmates in the United States, 143 Am. J. Psychiatry 838, 840-44 (1986); Lewis, Pincus, Bard, Richardson, Feldman, Prichep & Yeager, "Neuropsychiatric, Psychoeducational and Family Characteristics of 14 Juveniles Condemned to Death in the United States" (paper presented to American Academy of Child and Adult Psychiatry, Oct. 1987).

[9]Bluestone & McGahee, supra.

impersonally result in his death."[10]

C. Even death row inmates that have sufficient mental capabilities are not able to adequately represent themselves in collateral proceedings.

Furthermore, even a death sentenced inmate that is not illiterate, mentally retarded or mentally ill, is not able to adequately represent himself in post-conviction proceedings. This is so for a number of reasons.

1. Complexity

First, the substantive law relevant to capital cases is complex, and difficult enough to master for an attorney, much less a lay person with, at best, a high school education.[11] Besides being familiar with

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[10]R. Johnson, Condemned to Die 94 (1981).

[11]This complexity is evident from the number of capital issues resolved by this Court in the twelve years since Gregg v. Georgia, 428 U.S. 153 (1976) was decided.

this Court's Eighth Amendment Jurisprudence, an inmate in post-conviction proceedings must be sure not to engage in a procedural default of even any kind that might later preclude the federal courts in a habeas corpus proceeding from reviewing the merits of a ground for relief. See, e.g. Murray v. Carrier, 477 U.S. 527 (1986); see also Godbold, Pro Bono Representation of Death Sentenced Inmates, The Record of the Association of the Bar of the City of New York 859, 862 (1987).[12]

It is further evidenced by studies of the time spent by attorneys representing death sentenced persons in collateral proceedings. See Report prepared for the American Bar Association by the Spangenberg Group, "Time and Expense Analysis in Post-Conviction Death Penalty Cases," February 1987; see also Brief of Amicus Curiae American Bar Association. The median number of hours spent by counsel in state post-conviction alone was six hundred and sixty five hours. Id.

[12]Judge Godbold, former chief judge of the United States Court of Appeals for the Eleventh Circuit, stated:

"It [capital punishment law] is the

2. Limited access to law library

Furthermore, many condemned inmates are prohibited from gaining physical access to the prison law library, which itself often is inadequate. In South Carolina, for example, inmates must request that specific legal materials be brought to their cells. The same restrictions apply in most other states with persons on death row. Such limited access makes it impossible for an inmate even to keep current with the complex and ever-changing law relevant to capital cases, much less to research procedural issues such as procedural default, exhaustion of state remedies, and types of evidence which are admissible and relief available.

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most complex area of the law that I deal with.... It's difficult. It's changeable. And it's very hard to apply."

3. The need for factual investigation

Furthermore, a great deal of factual investigation is in most cases critical if an inmate is to have any chance of obtaining post-conviction relief. Most viable post-conviction claims are not strictly legal issues, but have to do with after-discovered evidence or other grounds for relief that require extensive factual investigation. Sometimes new evidence of innocence is found. See, e.g., McDowell v. Dixon, 858 F.2d 945 (4th Cir. 1988) (evidence discovered during post-conviction that eyewitness in North Carolina capital case had originally identified perpetrator as being white, while defendant was a black person). In other cases factors beyond the inmate's control, such as mental illness, or a childhood of extreme abuse or neglect, may explain or mitigate the crime. See, e.g., Curry v. Zant, 258 Ga. 527, 371

S.E.2d 647 (1988) (evidence of organic brain damage discovered by counsel in state post-conviction proceedings). Sometimes additional evidence of a defendant's positive qualities is found, making it less simple to reduce the defendant to someone who has no right to live.[13] Other irregularities in the proceedings are also frequently uncovered. See, e.g., Amadeo v. Kemp, 108 S.Ct. 1771 (1988) (evidence at

[13]Without the assistance of counsel, it is extremely unlikely that Andrew Laverne Smith and Shelly Damon, two South Carolina death row inmates, would have obtained post-conviction relief in the state courts. In both cases expert and lay testimony regarding the individual inmates' adaptability to prison was gathered and presented. On the basis of this evidence the state post-conviction court granted found that these individual's death sentences were obtained in violation of Skipper v. South Carolina, 476 U.S. 1 (1986). It is fanciful to believe that the inmates themselves could have gathered or adequately presented this evidence in a way which would have resulted in the success achieved by counsel.

intentional racial discrimination in selection of the grand jury in Georgia capital case uncovered during collateral proceedings); Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988) (counsel discovered evidence during post-conviction proceedings in Virginia capital case that the jury at the petitioner's capital murder trial had been approached during deliberations and told they "ought to fry the son of a bitch"). An individual isolated in a cell without financial resources simply cannot do the necessary factual investigation.

Effective post-conviction litigation requires a complete reinvestigation of the case, with a focus on material not in the trial transcript. What evidence was not presented and why? What evidence was not investigated and why? The trial transcript provides clues, but those clues mark only the beginning of the post-conviction

litigator's task. Even with access to a prison law library, inmates have little or no access to outside sources, such as expert witnesses (Ballistic, forensic, medical, psychiatric), character witnesses, and prior counsel, that may be vital to their cases. Mello, Facing Death Alone, supra at 543-48. Inmates pursuing post-conviction relief also have difficulty pursuing claims of ineffective assistance of counsel. To establish an ineffectiveness claim an inmate must produce evidence of the "background, character and reputation of appointed trial counsel and of what [counsel] did and failed to do," id., evidence which confined death row inmates have no way of obtaining.[14] See Armstrong v. Dugger, 833

[14]For example, in Hyman v. Aiken, 824 F.2d 1405 (1987), while granting relief on the basis of an unconstitutional malice instruction, the court of appeals discussed in detail the inadequate representation received by William Gibbs Hyman, a South Carolina death row inmate.

F.2d 1430 (11th Cir. 1987).

4. The State is represented by experienced counsel.

Another aspect of the unfairness in asking death row inmates to proceed pro se in state collateral proceedings is that the state is in all cases represented by competent and highly trained attorneys. The South Carolina Attorney General's office, for example, employs at least four attorneys who specialize in post-conviction proceedings. These attorneys are very knowledgeable regarding the substantive law

The factual basis of petitioner's inadequate representation was developed in state post-conviction proceedings. The evidence consisted of additional evidence that could have been presented at trial and opinions of prominent members of the bar regarding the quality of the representation Hyman received. If Hyman had been forced to represent himself in the post-conviction proceeding, he would not have been able to adequately develop a proper factual record.

and procedure relevant to capital post-conviction proceedings. The same is true in all other states that have the death penalty. Thus, under circumstances where the state is represented by competent and highly trained individuals, the person whom the state seeks to execute cannot be fairly asked to proceed without the assistance of counsel.

> D. Recent judicial and legislative actions demonstrate the realization that even attorneys appointed to represent indigent death sentenced inmates need assistance from persons experienced in capital litigation to adequately represent these persons.

Due to the complexity of capital litigation, even competent attorneys find it necessary to seek expert assistance. See "You Don't Have to Be a Bleeding Heart," Mikva and Godbold, 14 Human Rights,

22, 24 (Winter 1987). This need has been realized by the judicial and legislative branches of both the federal and state governments. In this regard the Judicial Conference of the United States and the Congress have recognized the importance of the involvement of expert legal consulting services in federal habeas corpus proceedings involving death sentenced inmates. This realization was formalized in the Criminal Justice Act Guidelines, paragraph 3.16, which was recently added to the CJA Guidelines. This section provides:

> 3.16 Consulting Services in Capital Federal Habeas Corpus Cases. Where necessary for adequate representation, subsection (e) of the Criminal Justice Act authorizes the reasonable employment and compensation of public and private organizations (such as the Florida Capital Collateral Representative and the

> California Appellate Project) which provide consulting services to appointed and pro bono lawyers in capital federal habeas corpus cases in such areas as records completion, exhaustion of state remedies, identification of issues, review of draft pleadings and briefs, etc.

In February 1987, the Conference of Chief Justices, which consists of the chief judicial officer of every state and territory and the District of Columbia, urged the judicial leadership in each state having the death penalty to take action to assure that death row inmates receive competent legal representation in post-conviction review. The Chief Justices resolved that each state's judicial leadership should quickly begin a planning process involving executive and legislative representatives, the organized bar, and

prosecutors and defense counsel experienced in death penalty litigation "to establish a regular process for appointing, providing expert guidance for, and fairly compensating competent counsel to prepare and pursue state post-conviction petitions for all state death row inmates wishing to pursue such remedies."[15]

Of special significance is the creation of a number of death penalty resource centers to provide expert legal consulting services to counsel of record in

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[15]Resolution Ix, "Representation of Death Row Inmates in Post-Conviction Proceedings, adopted at the 10th Midyear Meeting of the Conference of Chief Justices on February 5, 1987, in Gleneden Beach, Oregon (emphasis added). The Chief Justices also proposed that each state's judicial leadership enter into a dialogue with representatives of the federal courts "to assure continuity of representation of death row inmates in state and federal post-conviction proceedings and an equitable apportioning of the costs of such representation between the state and federal judicial systems." Id.

death penalty cases.[16] Resource Centers have been created in thirteen states, including South Carolina.[17] Without the support of the federal and state judges in these various states, the creation of the Resource Centers would have been impossible. Furthermore, most states, the Resource Centers receive both state and federal funds. The Resource Centers will assist appointed and volunteer counsel in the identification of available grounds for relief, preparation of pleadings, legal research and preparation for hearings. Thus, the Resource Centers are a recognition by state and federal judicial

[16]Summary Report of the United States Judicial Conference Committee to Implement the Criminal Justice Act, Agenda Item G-11, Criminal Justice Act, March 1987.

[17]These states are: Alabama, Arizona, California, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee and Texas.

and legislative bodies that even practicing attorneys need assistance from persons experienced in capital litigation in these complex and time consuming matters, and rebut any argument that death sentenced inmates are able to achieve meaningful access to the courts without the assistance of counsel.[18]

E. Volunteer counsel cannot be relied upon to provide indigent death sentenced inmates with meaningful access to the courts.

[18]Congress has also taken other important steps which underscore the need for counsel and the complexity of capital litigation. First, the Anti-Drug Abuse Act of 1988 contains provisions guaranteeing appointment of counsel for all state prisoners under sentence of death in federal habeas corpus proceedings. H.R. 5210, 100th Cong., 2d Sess., 134 Cong. Rec. H 11,110, H 11,173 (1988). Recent legislation also raised the hourly rates of compensation in such matters to $75 an hour, with a $750 maximum that is routinely waived. Compensation for expenses of counsel, such as investigation and expert witnesses was also increased. 18 U.S.C.A. 3006A(d) and (e) (1987).

Many states have relied--and continue to rely on attorneys willing to volunteer to represent pro bono indigent persons on death row. However, because of the increasing number of inmates under sentence of death entering the state post-conviction and federal habeas corpus stages of the appellate process, this system of utilizing volunteer counsel, who in many cases are not compensated at all, is no longer workable. See Wilson and Spangenberg, State Post-Conviction Representation of Defendants sentenced to death, Judicature (forthcoming February 1989) ("the pool of volunteer lawyers cannot expand rapidly enough to meet the growing need").[19] It is

[19]In South Carolina, for example, even attorneys appointed by the court to represent death row inmates in state post-conviction are not compensated. See Cowden, South Carolina Indigent Defense Services on Post-Conviction Relief, Report prepared for the South Carolina Law Institute (September 1988).

becoming increasingly difficult to find persons willing to agree to spend hundred of hours and thousands of dollars to represent persons on death row. Thus the only viable means of providing persons on death row with meaningful access to the courts is by the appointment of counsel who will be fairly compensated for their time and expenses.

CONCLUSION

For the reasons set forth in this brief, amici respectfully submits that this Court should conclude that a death sentenced inmate cannot achieve meaningful access to the courts without the assistance of counsel and, therefore, requests that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

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